APPENDIX A

SUPREME COURT OF NEW JERSEY

MOUNT LAUREL TOWNSHIP, Plaintiff-Respondent,

v.

MiPRO HOMES, L.L.C., Defendant-Appellant, and Lorraine C. Elbon and 190 Elbo, L.L.C., Defendants, and Builders League of South Jersey, Inc., a New Jersey non-profit corporation, Defendant-Intervenor-Appellant.

Argued May 1, 2006.
Decided Dec. 7, 2006.

PER CURIAM.

We affirm the holding of the Appellate Division for the reasons expressed by Judge Skillman in his thoughtful and well-written opinion. We recognize, as did the panel below, that the citizens of New Jersey have expressed a strong and sustained public interest in the acquisition and preservation of open space. The Appellate Division points to the numerous statutes enacted in the 1960s and 70s, and even more recently in the 1990s, authorizing loans and grants to expand the State's Green Acres Program. Most pertinent here, various of those statutes provide municipalities with the power of eminent domain to acquire land for recreation and conservation purposes. *Mt. Laurel Twp.* v. *MiPro Homes, L.L.C.*, 379 N.J. Super. 358, 371-372, 878 A.2d 38 (App. Div. 2005) (citing New Jersey's Green Acres statutes, N.J.S.A. 13:8A-1 to -55, authorizing state and local governments to acquire land for recreation and conservation purposes). Even more telling, New Jersey residents have voted repeatedly for the issuance of state and county bonds to provide funding for open space acquisition.

That Mount Laurel Township sought to limit development, thereby to limit the overcrowded schools, traffic congestion and pollution that accompanies

development, does not alter our disposition of this case. The town's motive is not inconsistent with the motive driving the public interest in open space acquisition generally. *See* N.J. Dep't of Envtl. Prot., *Smart Growth*, at http://www.state.nj.us/dep/antisprawl/ (last modified Nov. 14, 2005) (stating that New Jersey is "the nation's most densely populated state, and the most developed" and that "[i]ll-conceived land use and poorly designed development threatens our vital drinking-water supplies, devours our open space, spoils our landscape and creates traffic congestion that pollutes our air.").

Finally, we note that on remand and the appointment of condemnation commissioners, the property will be valued at its fair market value, including value associated with MiPro's final subdivision approval obtained twenty-two days before the filing of the declaration of taking. *Cf. State ex rel. Commissioner of Trans.* v. *Caoili*, 135 N.J. 252, 268, 639 A.2d 275 (1994) (stating that "potential subdivision is a highly material factor bearing on the optimum use of the property and its fair market value.").

Justice RIVERA-SOTO, dissenting.

I disagree with the majority's holding in two fundamental respects. First, I conclude, much as the trial court did, that this case presents an improper exercise of the power of eminent domain. Second, although the majority attempts to lighten the effect of its ruling by adding to the quantum of damages to which MiPro Homes, L.L.C. (MiPro) is entitled as a result of the condemnation proceedings instituted by Mount Laurel Township (Township), the majority simply does not go far enough. Therefore, I respectfully dissent.

I.

A.

Unlike the Appellate Division's broad conclusion that "a municipality's acquisition for open space of properties on

which residential development is planned constitutes a proper use of the eminent domain power[,]" *Mt. Laurel Twp.* v. *MiPro Homes, L.L.C.*, 379 N.J. Super. 358, 362, 878 A.2d 38 (App. Div. 2005)[1] a conclusion embraced by the majority, *ante*, 188 N.J. at 533, 910 A.2d at 618, I subscribe to the analysis adopted by the trial court, which aptly concluded that "the condemnation here can best be described as a random taking without legal justification."

This case presents the unique and, in my view, egregious circumstance in which "the real purpose [of the condemnation] was to prevent yet another residential development pressure." In those particular circumstances, I must side with the trial court when it explained that "[i]f the Township desires to continue to purchase property for open space, it may do so. Those purchases may only be made from willing sellers, not by resort to condemnation of tracts under development from private owners unwilling to give up their properties and vested approvals."

We have long held that "[t]he exercise of [the power to condemn] will not be interfered with by the courts in the absence of fraud, bad faith or circumstances revealing arbitrary or capricious action." *Texas E. Transmission Corp.* v. *Wildlife Preserves, Inc.*, 48 N.J. 261, 269, 225 A.2d 130 (1966). As early as 1891, our predecessor court held that private property could not be taken via condemnation save upon "[a] fair sense ... said to be promotive of the welfare or convenience of the community...." *North Baptist Church* v. *City of Orange*, 54 N.J.L. 111, 113, 22 A. 1004 (Sup. Ct. 1891) (citation and internal quotation marks omitted). Sixty years later, we clarified that "the decision of [a] condemnor is final *as long as it acts reasonably and in good faith*." *City of Newark* v. *N.J. Tpk. Auth.*, 7 N.J. 377, 385, 81 A.2d 705,

---

[1] The Appellate Division refers to MiPro as "Mipro." However, MiPro's written submissions all capitalize the "p" in MiPro, and both the majority and I have adopted that convention.

appeal dismissed, 342 U.S. 874 (1951) (quoting 1 *Nichols, Eminent Domain* 383 (3rd ed. 1950)) (emphasis supplied). We ultimately described the standard to be applied thusly: "The exercise of [the power to condemn] will not be upset by the courts in the absence of an affirmative showing of fraud, bad faith or manifest abuse." *City of Trenton* v. *Lenzner*, 16 N.J. 465, 473, 109 A.2d 409 (1954), *cert. denied*, 348 U.S. 972 (1955).

When gauged through that prism, the Township's transparent after-the-fact explanations of its public policy basis for the condemnation of MiPro's property simply do not withstand serious scrutiny. That examination requires that I conclude, as the trial court inescapably did, that "the public purpose articulated for the taking of MiPro's property for passive open space was not based on a true public need but solely in response to the community's sentiment expressed at the polls, coupled with clear indications from township officials, that the property be acquired to stop residential development." Thus, to the extent the majority accepts the Appellate Division's reasoning and rejects the trial court's thoughtful analysis and conclusions, I respectfully dissent.

B.

Furthermore, I reject the Appellate Division's value judgment in respect of the social worth of MiPro's development plans. According to the panel, the exercise of the Township's power of eminent domain would have been barred if MiPro's development had been for "medical rehabilitation and nursing facilities," or "multi-family housing affordable to middle-income families[,]" or even for MiPro's "predecessor in title['s] planned . . . assisted living facility on the site[.]" *Mt. Laurel Twp.* v. *MiPro Homes, L.L.C.*, *supra*, 379 N.J. Super. at 376-77, 878 A.2d 38. Having thus couched the issue presented, the Appellate Division condemned MiPro's development plan because its "development of single-family homes that will be affordable

only to upper-income families would not serve a comparable public interest." *Id.* at 377, 878 A.2d 38. In my view, a judge's individualized and idiosyncratic view of what is or is not socially redeeming has no place in determining whether the sovereign's exercise of the power of eminent domain is proper. The issue here was and remains whether the Township—and *not* MiPro—acted unreasonably, in bad faith, or in circumstances revealing arbitrary or capricious actions. Applying that yardstick, the trial court held—in my view, correctly—that the Township failed to meet its burden. I would not disturb that determination, least of all in the pursuit of some ill-defined social goal.

II.

Even if the Township's condemnation efforts could be justified as a proper taking, I also disagree with the measure of damages the majority allows. According to the majority, "on remand and the appointment of condemnation commissioners, the property will be valued at its fair market value, including value associated with MiPro's final subdivision approval obtained twenty-two days before the filing of the declaration of taking." *Ante*, 188 N.J. at 534, 910 A.2d at 618 (2006). That measure of damages is, to me, woefully inadequate.

The relevant facts are past dispute: MiPro's property was zoned for residential use, precisely the use MiPro intended, and, hence, no variances were required; the only governmental approval MiPro sought—and validly secured—was a subdivision approval to subdivide one large lot into smaller, residential lots that nonetheless each still conformed to the requirements of the Township's zoning ordinance; the Township failed to amend its zoning ordinance to list MiPro's property as other than for residential use in anything even remotely close to a timely and fair manner; and, the Township's obvious purpose was not to increase open space for the use and enjoyment of its citizens, but plainly to forestall additional development and

its concomitant additional demand on municipal facilities or services.

In that context, limiting the condemnee's recovery to the fair market value of his property, including any increase in the value resulting from the subdivision approval, denies the property owner the basis of his bargain. MiPro purchased this property with the intent of developing a single-family housing development. MiPro acted on that intent, secured the required permits and commenced construction. Once MiPro secured its permits and acted in reliance thereon, MiPro's rights became vested. *See generally* N.J.S.A. 40:55D-49 (granting three-year non-disturbance period to major subdivision or site plan preliminary approval); N.J.S.A. 40:55D-52 (granting two-year non-disturbance period to zoning final approvals). It is obvious that MiPro engaged in this course of conduct for a reason: to profit from the development and sale of single-family residences.

Central to our system of justice is the concept that "[a]n injured person is entitled to be made whole." *Patusco* v. *Prince Macaroni, Inc.*, 50 N.J. 365, 368, 235 A.2d 465 (1967). In that same vein, "[t]he goal of compensatory damages is to restore the plaintiff to the same position it was in prior to the occurrence of the wrong." *Material Damage Adjustment Corp.* v. *Open MRI of Fairview*, 352 N.J. Super. 216, 232, 799 A.2d 731 (Law Div. 2002). Those core principles lead to but one fair and equitable conclusion: that, unless the Township can demonstrate that MiPro was unable or unwilling to complete that development, the proper quantum of damages arising from this taking is the aggregate of MiPro's restitution damages[2] and expectancy damages.[3]

---

[2] Those include MiPro's development costs to date, including acquisition costs. *See Material Damage Adjustment Corp.* v. *Open MRI of Fairview, supra*, 352 N.J. Super. at 232, 799 A.2d 731 (defining restitution as "an award of compensatory damages [that] requires the full restoration or 'restitution' to plaintiff of all payments made"); *Black's Law Dictionary* 1315 (7th ed. 1999)

Anything less takes from MiPro a property right without just compensation, something prohibited by our Constitution, N.J. Const. art. I, ¶ 20 ("Private property shall not be taken for public use without just compensation."), and a concept embodied in the Eminent Domain Act of 1971. N.J.S.A. 20:3-29 ("The condemnee shall be entitled to compensation for the property, and damages, if any, to any remaining property, together with such additional compensation as provided for herein, or as may be fixed according to law.").

Therefore, because the quantum of damages allowed by the majority on remand artificially deflates the value of MiPro's property, I respectfully dissent.

(defining restitution as "[c]ompensation or reparation for the loss caused to another").

[3] Those include the profit MiPro could reasonably have been expected to reap as a result of this development project. *See Furst* v. *Einstein Moomjy, Inc.*, 182 N.J. 1, 14, 860 A.2d 435 (2004) (defining "expectation interest" as "the benefit of the bargain"); *Sons of Thunder, Inc.* v. *Borden, Inc.*, 285 N.J. Super. 27, 104, 666 A.2d 540 (App. Div. 1995), *rev'd on other grounds*, 148 N.J. 396, 690 A.2d 575 (1997); *Noye* v. *Hoffman-La Roche, Inc.*, 238 N.J. Super, 430, 437, 570 A.2d 12 (App. Div.), *certif. denied*, 122 N.J. 146, 147, 584 A.2d 281 (1990).

APPENDIX B

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

MOUNT LAUREL TOWNSHIP, Plaintiff-Appellant/Cross-Respondent,

v.

MiPRO HOMES, L.L.C., Defendant-Respondent/Cross-Appellant, and Lorraine C. Elbon and 190 Elbo, L.L.C., Defendants, and Builders League of South Jersey, Inc., Defendant-Intervenor-Respondent.

Argued April 26, 2005.
Decided Aug. 2, 2005.

Before Judges SKILLMAN, GRALL and GILROY.

The opinion of the court was delivered by SKILLMAN, P.J.A.D.

The issue presented by this appeal is whether evidence that a municipality's motive in selecting properties for open space acquisition is to slow down residential development makes use of the eminent domain power for this purpose improper. We conclude that a municipality's acquisition for open space of properties on which residential development is planned constitutes a proper use of the eminent domain power.

Plaintiff Mount Laurel Township is a rapidly developing municipality. Between 1960 and 1999, Mount Laurel's population grew from 5,249 to approximately 40,000, and it continues to grow at a rate of approximately 1,000 people per year. This rapid growth has created a strain on Mount Laurel's schools, roadways, police and fire departments and other municipal services.

For a substantial period of time, Mount Laurel was a party to exclusionary zoning litigation. In fact, Mount Laurel

was the defendant in the leading early exclusionary zoning cases in this State, *Southern Burlington County NAACP* v. *Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808. (1975) and *Southern Burlington County NAACP* v. *Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983). A 1985 order in that litigation resulted in a large section of Mount Laurel being placed in an "overlay" zone, in which a developer was permitted to construct five residential units per acre, provided 15% of the units were set aside for low- and moderate-incoming housing. This zoning, as well as Mount Laurel's limited financial resources, prevented the municipality from preserving a significant amount of land for open space from the mid 1980s to the late 1990s.

In 1997, Mount Laurel repealed the zoning ordinance establishing the overlay zone, as allowed under an "order of repose" entered in the exclusionary zoning litigation. At the same time, Mount Laurel's governing body decided to take action to slow down the rate of the municipality's growth and to preserve additional land for open space. Initially, the governing body planned to pursue this objective by rezoning substantial areas for less intensive uses and then seeking to acquire selected parcels for open space. However, after the municipality's counsel advised that this approach could pose legal problems, the governing body decided instead to pursue creation of additional open space by a public referendum authorizing the raising of additional municipal revenue for this purpose and applying for money available for acquisition of land for open space under the Green Acres program.

In July 1998, Mount Laurel's governing body adopted Ordinance 1998-6, which placed a referendum on the November 1998 ballot for a proposed tax increase of two cents per one hundred dollars of assessed value for acquisition of open space. The interpretative statement accompanying the referendum indicated that an owner of property assessed at $125,000 would pay an additional $25 in

property taxes per year for the next twenty years, for a total of $500, for this open space acquisition program. The statement also indicated that the fund created by this additional tax assessment would be "used exclusively for the acquisition of land for open space preservation, farmland preservation, historic preservation, parks and recreation." In campaigning for passage of this referendum, the Mayor of Mount Laurel and other public officials pointed out that the proposed open space acquisition program would not only preserve additional open space for passive and active recreational uses but also relieve residents of the tax burdens that would result from residential development. The referendum passed by an overwhelming vote.

The same November 1998 ballot containing this municipal referendum question also contained Burlington County and State ballot questions seeking authorization for the expenditure of additional public funds for acquisition of open space. The County question sought voter authorization for a County tax increase of two cents per one hundred dollars of assessed value (in addition to the municipal tax increase of the same amount) for open space acquisition. See Land Trust Alliance, *Voters Invest in Parks and Open Space: 1998 Referenda Results* at 5 (1999). The State question sought voter approval of a constitutional amendment dedicating $98 million annually for thirty years from the existing State sales and use tax to "finance open space, farmland, and historic preservation." *Manual of the Legislature of New Jersey* at 922 (Skinder-Strauss Assocs. 1999).

In urging approval of both the municipal and State ballot questions, the Mayor of Mount Laurel stated in a letter to voters:

> One of the advantages of the State referendum is that it creates a special preference category for municipalities that have passed an open space referendum to get resources quicker. In other words, if you vote "yes"

> on . . . the municipal referendum for open space, and the State question also passes statewide, Mount Laurel will be in a special category whereby the Township will be able to obtain State funding for open spaces more quickly and on a higher priority basis.

Both the State and County ballot questions authorizing additional expenditures of public funds for open space acquisition were approved. Land Trust Alliance, *supra*, at 5.

After approval of these referenda, the Mount Laurel governing body undertook to identify all remaining open space in the municipality to determine which parcels would be appropriate for acquisition and could qualify for Green Acres funding. The governing body retained a consultant, Bay Pointe Engineering, to assist in this process.

With the consultant's assistance, Mount Laurel adopted an Open Space Recreation Plan as required by the regulations governing the Green Acres program, N.J.A.C. 7:36-6.4. Mount Laurel's plan envisions both active and passive recreational uses in the open space it plans to acquire. These uses include a proposed bicycle/pedestrian path that will provide links between the municipality's parks, schools and other major public and private facilities. The plan's goal is to create a "community of place" within Mount Laurel:

> [T]he township is trying to address the need to provide a community of place, or a defined identity that characterizes the township. With the absence of a village core, the township consists of pockets of housing developments and commercial and industrial developments along the major highways.
>
> The township is now attempting to provide open spaces to soften the density of development, to provide relief from the stresses of suburban living, and to provide a unified land use pattern that links together all parts of the township. This community of place will be achieved by providing open spaces, and then linking them together

with a pedestrian or multi-purpose path system. The path systems can be located along County and township streets, through woods and fields and along stream corridors to provide continuous linkage. Some open space parcels may be used for recreation, while other parcels may be used for passive open space and support of environmentally sensitive areas. The pedestrian linkage between homes and nearby open spaces will be the major design element in creating a community of place.

In determining what land to acquire for open space, Mount Laurel assigns priority to the acquisition of large parcels zoned for residential development. The Mayor of Mount Laurel explained the reasons for this priority in her letter urging Mount Laurel residents to vote for the referendum authorizing the raising of additional revenue for acquisition of land for open space:

> The first reason is that residentially zoned land is, generally speaking, less expensive than commercially zoned land. I say this even though all land in Mount Laurel is expensive. Secondly, all of us who are property owners in Mount Laurel benefit from an industrial/commercial base which pays very substantial taxes but which requires few services. Commercial property owners send no children to our schools and set out no trash for municipal collection. They remove their own snow, clean their own parking lots and have a relatively low incidence of calling the Township for municipal service such as emergency rescue, police, etc.
>
> On the other hand, if the Township acquires land upon which homes would otherwise be built, those homes, just like your home and mine, would put additional burdens on all of the Township's taxpayers. The costs for municipal services are always increasing—just like our own personal budgets. Educational costs for however many children each home would send to the

school system over the entire time that those homes are standing is obviously a significant cost to all taxpayers for many years, perhaps indefinitely.

Defendant Mipro Homes, L.L.C. is the owner of a 16.3-acre parcel located in an area of Mount Laurel zoned for residential use, which is occupied by a single house. Mount Laurel initially did not include this parcel in the list of properties sought to be acquired for open space because Mipro's predecessor in title planned to construct an assisted living facility on the site that would have included units affordable to low- and moderate-income residents. However, Mipro contracted to purchase the site in the summer of 2001 for the purpose of building twenty-three single-family residences, priced between $400,000 and $450,000, and obtained preliminary subdivision approval for this development in June 2001. Title to the property was conveyed to Mipro on August 30, 2001.

When Mount Laurel's governing body became aware that the proposed use of the Mipro site had changed from an assisted living facility to a development for single-family residences, it decided to add the site to the list of parcels to be acquired under its open space acquisition program. On October 10, 2001, the Mount Laurel Township Manager sent a letter to Mipro which stated that its property had been "preliminarily listed as a potential parcel to be included in the Township Recreation and Open Space Plan." On October 15, 2001, the governing body adopted a resolution that added the Mipro site to its open space acquisition plan. On November 6, 2001, the residents of Mount Laurel approved another referendum authorizing an additional tax increase of two cents per one hundred dollars of assessed value for acquisition of open space, which assured adequate funding to acquire the Mipro site. On April 15, 2002, the governing body adopted an ordinance authorizing acquisition of the Mipro site.

On May 9, 2002, the Planning Board granted Mipro's application for final subdivision approval, which was memorialized by a resolution adopted on June 13, 2002.

After Mount Laurel was unable to obtain the Mipro site by voluntary acquisition, it brought this condemnation action on May 24, 2002, and filed a declaration of taking on May 31, 2002. During the twenty-two-day period between the grant of final subdivision approval and the filing of the declaration of taking, Mipro performed a significant amount of site preparation work on the site.

Mipro's answer to Mount Laurel's complaint asserted that the purpose of the condemnation action was to stop residential development and that this is an unlawful purpose. The trial court granted the Builder's League of South Jersey's motion to intervene in support of Mipro's position.

During the pendency of this action, the Planning Board adopted an amended master plan, which stated that the goals of the recreation and open space plan included acquisition of "the maximum amount of open space remaining in the township that can be achieved with sound use of financial resources" and reduction of traffic congestion and costs of municipal services. The amended master plan also stated that "[s]ince Mount Laurel is urbanized throughout the entire township, all potential parcels are locationally suitable for permanent open space." In addition, the Commissioner of the Department of Environmental Protection (DEP) notified Mount Laurel by a letter dated August 1, 2002, that its application for a $400,000 matching grant for acquisition of the Mipro site had been approved.

The case was brought before the court by cross-motions for summary judgment supported by voluminous factual materials. In a written opinion, the trial court recognized that Mount Laurel had initiated proceedings to condemn Mipro's property "for a facially valid purpose, namely, the acquisition of Mipro's tract to be held in perpetuity as a passive open

space." Nevertheless, the court concluded that Mount Laurel's "real purpose" in condemning Mipro's property "was to prevent yet another residential development in a township already under severe development pressure." The court stated that "the public purpose articulated for the taking of Mipro's property for passive open space was not based on a true public need but solely in response to the community's sentiment expressed at the polls, coupled with clear indications from township officials that the property be acquired to stop residential development." The court concluded that although Mount Laurel may use public money to prevent residential development and preserve open space by voluntary purchase from the owners, it may not resort to the power of eminent domain for these purposes:

There is nothing legally wrong with the chosen approach as long as the township *purchases* the property from a willing seller. The abuse of discretion and arbitrary, capricious and unreasonable action by the Township occurred when it abused the awesome power of eminent domain for a purpose not contemplated by, and indeed proscribed by, our Eminent Domain Law . . . If the Township desires to continue to purchase property for open space, it may do so. Those purchases may only be made from willing sellers, not by resort to condemnation of tracts under development from private owners unwilling to give up their properties and vested approvals.

Accordingly, the trial court entered summary judgment dismissing Mount Laurel's action to condemn Mipro's property.

Mount Laurel filed a notice of appeal from the summary judgment. Thereafter, the trial court entered another order awarding Mipro $219,815.14 for counsel fees, costs and other expenses it incurred as a result of the condemnation action. Mount Laurel filed a separate notice of appeal from this order. In the second appeal, Mipro filed a notice of cross-appeal claiming that the trial court should have awarded

additional damages resulting from the condemnation action. We now consolidate the appeals.

We conclude that a municipality has statutory authority to condemn property for open space; that a municipality may exercise this authority even though it does not presently have a plan to devote the property to active recreational uses; that the selection of properties for open space acquisition on which residential development is planned does not constitute an improper exercise of the eminent domain power; and that Mipro did not present evidence that could support a finding that Mount Laurel's decision to condemn its property constituted an abuse of the eminent domain power. Therefore, we reverse the judgment dismissing Mount Laurel's complaint as well as the order awarding Mipro counsel fees, costs and expenses and remand the case for an order appointing condemnation commissioners.

Before discussing the primary issue presented by this appeal, we first address the Builders League's argument that Mount Laurel lacked legal authority to condemn Mipro's site for open space because the zone in which the property is located was not designated as open space in Mount Laurel's master plan.

Under the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163, a master plan must include a "land use plan element" that, among other things, shows "the existing and proposed location, extent and intensity of development of land to be used in the future for varying types of residential, commercial, industrial, agricultural, recreational, educational and other public and private purposes or combination of purposes." N.J.S.A. 40:55D-28(b)(2)(b). A master plan also may contain various optional elements, including "[a] conservation plan element providing for the preservation, conservation, and utilization of natural resources, including, to the extent appropriate, . . . open space." N.J.S.A. 40:55D-28(b)(8).

The MLUL requires a zoning ordinance to be "substantially consistent with the land use plan element and the housing plan element of the master plan" unless the governing body adopts a zoning ordinance inconsistent with those elements "by affirmative vote of a majority of the full authorized membership of the governing body, with the reasons of the governing body for so acting set forth in a resolution and recorded in its minutes." N.J.S.A. 40:55D-62(a). However, a zoning ordinance is not required to be substantially consistent with the conservation element of the master plan.

In any event, this case involves a municipality's exercise of the eminent domain power rather than zoning. Moreover, the statutes authorizing acquisition of land for open space establish separate administrative procedures designed to assure that a municipality's open space program reflects sound planning. One of those statutes establishes the Office of Green Acres, N.J.S.A. 13:8C-24(a)(1), which is required to adopt application procedures for grants and loans and develop criteria and policies for evaluating and ranking projects, N.J.S.A. 13:8C-24(b)(3)(a). The Green Acres Program has adopted detailed regulations that prescribe the information a municipality must supply in order to obtain such funding. N.J.A.C. 7:36-1.1 to -21.4.

This information includes a recreation and open space inventory and a detailed description of the project for which the municipality seeks funding. N.J.A.C. 7:36-6.4. Before filing this action, Mount Laurel applied to the Green Acres Program for funding under these provisions and secured a $400,000 grant for acquisition of the Mipro site, which reflects a finding by the Green Acres Program that the Mipro site is suitable for open space acquisition. Therefore, we conclude that Mount Laurel's governing body had authority to condemn the Mipro site for open space even though the

master plan did not then identify open space as a planned use in the area where it is located.[4]

The Builders League also argues that Mount Laurel lacked authority to condemn the Mipro site because the governing body did not refer this proposed acquisition to the Planning Board in accordance with N.J.S.A. 40:55D-31. This section is part of Article IV of the MLUL, which authorizes a governing body to delegate authority to the planning board "to prepare a program of municipal capital improvement projects." N.J.S.A. 40:55D-29. However, the requirement that a governing body "refer the action involving such specific project to the planning board for review and recommendation in conjunction with [the] master plan" only applies if the governing body has authorized the planning board "to prepare a program of municipal capital improvement projects" in accordance with N.J.S.A. 40:55-29. Because there is no indication that Mount Laurel's governing body delegated such authority to the Planning Board, the governing body has authority to condemn the Mipro site without referring the proposed acquisition to the Planning Board for its review and recommendation under N.J.S.A. 40:55D-31.

II

We now turn to the primary issue presented by this appeal: whether an action to condemn property for open space may be maintained even if the condemnee can show that the municipality's motive in selecting particular

---

[4] Because we reach this conclusion, we have no need to decide whether amendment of the master plan during the pendency of this action, which recognized that all land in Mount Laurel is "locationally suitable for open space," would permit maintenance of this action under the "time of decision" rule even if there were a requirement that land be designated in the master plan for use as open space before it can be acquired for this purpose. *See Manalapan Realty, L.P.* v. *Township of Manalapan*, 140 N.J. 366, 386, 658 A.2d 1230 (1995).

properties for acquisition is to slow down residential development.

The New Jersey Constitution recognizes that private property may be condemned for "public use." N.J. Const. art. I, ¶ 20. The Eminent Domain Act, N.J.S.A. 20:3-1 to -50, establishes the procedures that govern eminent domain actions authorized by other statutory enactments, N.J.S.A. 20:3-6.

Our Legislature has long recognized that preservation of open space constitutes a public use, and therefore municipalities may utilize the eminent domain power to acquire property for this purpose. As early as 1917, the Legislature enacted the "Home Rule Act," L. 1917, c. 152, art. XXXVI, § 1, now codified in N.J.S.A. 40:61-1, which provides that a municipality may acquire property for "open spaces" by exercise of the power of "condemnation."

In the 1960s and 70s, the Legislature expressly recognized the public interest in acquisition of land for open space by enactment of the New Jersey Green Acres Land Acquisition Act of 1961, L. 1961, c. 45; N.J.S.A. 13:8A-1 to -18, the New Jersey Green Acres Land Acquisition Act of 1971, L. 1971, c. 419; N.J.S.A. 13:8A-19 to -34, and the New Jersey Green Acres Land Acquisition and Recreation Opportunities Act, L. 1975, c. 155; N.J.S.A. 13:8A-35 to -55. These statutes declare that it is in the public interest for the State and local governments to acquire additional land for "public recreation and the conservation of natural resources," N.J.S.A. 13:8A-2; N.J.S.A. 13:8A-20; N.J.S.A. 13:8A-36, and authorize the State to make loans or grants to municipalities to acquire property for these purposes, N.J.S.A. 13:8A-4; N.J.S.A. 13:8A-22; N.J.S.A. 13:8A-38. These statutes also provide that the power of eminent domain may be used to acquire land for recreation and conservation purposes. N.J.S.A. 13:8A-6; N.J.S.A. 13:8A-8; N.J.S.A. 13:8A-24; N.J.S.A. 13:8A-26; N.J.S.A. 13:8A-40; N.J.S.A. 13:8A-42.

In recent years, the Legislature has reaffirmed a municipality's statutory authority to utilize the power of eminent domain to acquire land for open space and established new methods to generate the financial resources required for such acquisitions. In 1997, the Legislature enacted what is sometimes referred to as the Municipal Trust Fund Act, N.J.S.A. 40:12-15.1 to -15.9, which confers authority upon a municipality to submit a public referendum to the voters for approval of a tax levy for "acquisition of lands for recreation and conservation purposes." N.J.S.A. 40:12-15.7(a)(1)(a). This legislation states that "[r]ecreation and conservation purposes" includes "the use of lands for . . . open space," and it specifically authorizes acquisition of land for this purpose by "condemnation," N.J.S.A. 40:12-15.1. Mount Laurel's residents have approved three referenda under this legislation authorizing tax levies for the acquisition of property for recreation and conservation purposes. Land Trust Alliance, *supra,* at 5-7.

In November 1998, the voters approved N.J. Const. art. VIII, § 2, ¶ 7, which dedicates funds from the State sales and use tax for acquisition and development of land for recreation and conservation purposes as well as farmland and historic preservation. Less than a year after adoption of this constitutional amendment, the Legislature enacted the Garden State Preservation Trust Act, N.J.S.A. 13:8C-1 to -42. This legislation contains legislative declarations that "there is growing public recognition that the quality of life, economic prosperity, and environmental quality in New Jersey are served by the protection and timely preservation of open space" and that "it is in the public interest to preserve as much open space . . . as possible within the means provided by the 1998 constitutional amendment." N.J.S.A. 13:8C-2. The Garden State Preservation Trust Act creates a trust fund to assist "[l]ocal government unit[s]," which include municipalities, N.J.S.A. 13:8C-3, to acquire land for recreation and conservation purposes. N.J.S.A. 13:8C-27(a)(2)(a). In addition, this legislation expressly recognizes

that the methods by which a municipality may acquire land thereunder include "eminent domain." N.J.S.A. 13:8C-3.

In short, there are multiple statutory enactments that confer authority upon municipalities to acquire land by eminent domain for preservation of open space and land conservation.

III

The next question is whether a municipality may exercise this authority even though it does not presently have a plan to devote the land to an active recreational use or, as Mipro poses the issue, even though Mount Laurel cannot demonstrate a "need" to acquire the particular parcel on which Mipro plans to construct a residential development.

The short answer is that the conservation of land for open space is a public use, even though the government agency acquiring the land has no plans to put the property to any active use. The Green Acres statutes recognize that the State and local governments may acquire land not only for "public recreation" but also "conservation of natural resources." N.J.S.A. 13:8A-2; N.J.S.A. 13:8A-20; N.J.S.A. 13:8A-36. The Municipal Trust Fund Act also authorizes municipalities to acquire land for both "recreation and conservation purposes," N.J.S.A. 40:12-15.2, and defines "conservation" to include "use of lands for . . . open space," N.J.S.A. 40:12-15.1. Similarly, the Garden State Preservation Act declares that "it is in the public interest to preserve as much open space . . . as possible," N.J.S.A. 13:8C-2, and authorizes the exercise of the power of eminent domain for this purpose, N.J.S.A. 13:8C-3. None of these statutory enactments include either an explicit or implicit requirement that a municipality have a plan for the active use of land acquired thereunder or be able to demonstrate a "need" for the acquisition. To the contrary, the manifest legislative intent in authorizing acquisition of land for "conservation" and "open space" is to authorize acquisition for use as passive open space. Thus,

these statutory enactments recognize that open space acquisition may serve the public interest not only by setting aside land for potential future recreational uses but also by preventing development that may aggravate a municipality's traffic congestion and pollution problems and put additional strain on municipal services such as schools.

Our conclusion that a municipality has statutory authority to condemn land to preserve open public space, without any plan to put the land to active use, is supported by *Dolan* v. *Borough of Tenafly*, 75 N.J. 163, 380 A.2d 1119 (1977). In that case, one of the issues was whether a municipality's condemnation for use as open space of the last substantial area of vacant, residentially zoned land within its boundaries was contrary to *Mount Laurel, supra,* 67 N.J. 151, 336 A.2d 713. *Dolan, supra,* 75 N.J. at 169, 380 A.2d 1119. There was no indication that the municipality had a plan to put the land to any active use. Nevertheless, the Court rejected the argument that the acquisition would violate *Mount Laurel,* noting that it served the "vitally important public purpose[s]" of the 1971 and 1975 Green Acres statutes. *Id.* at 175, 380 A.2d 1119.

The trial court's conclusion that Mount Laurel can acquire the Mipro site for open space by negotiation with the owner but lacks authority to acquire the property by eminent domain is inconsistent with the statutes authorizing municipalities to acquire land for open space. These statutes all provide for voluntary acquisition or condemnation as alternative methods by which a municipality may obtain title to land for use as open space. N.J.S.A. 13:8A-6; N.J.S.A. 13:8A-24; N.J.S.A. 13:8A-40; N.J.S.A. 13:8C-3; N.J.S.A. 40:12-15.1. Furthermore, if these statutes were construed not to provide authorization for condemnation of land for open space, it would put the landowner in a position to dictate a purchase price far in excess of the property's fair market value. Therefore, the same public purposes that justify the use of public funds to acquire land for open space by

voluntary acquisition also justify invocation of the power of eminent domain. *Cf. Kelo* v. *City of New London*, -- U.S. --, --, 125 S. Ct. 2655, 2657, 162 L. Ed. 2d 439, 445-46 (2005) (equating "public use" under the Fifth Amendment Takings Clause with a "public purpose").

IV

The trial court concluded that even though Mount Laurel's condemnation of the Mipro site was for the "facially valid purpose" of preserving the site "in perpetuity as . . . passive open space," Mount Laurel was not authorized to condemn the site because the undisputed evidence showed that its motive in bringing this condemnation action was to prevent Mipro's proposed residential development. In reaching this conclusion, the court relied upon statements by the mayor and other public officials in urging Mount Laurel residents to vote for the public referenda authorizing special tax levies for open space acquisition.

"It is well-established that a reviewing court will not upset a municipality's decision to use its eminent domain power 'in the absence of an affirmative showing of fraud, bad faith or manifest abuse.'" *Township of West Orange* v. *769 Assocs.*, 172 N.J. 564, 571, 800 A.2d 86 (2002) (quoting *City of Trenton* v. *Lenzner*, 16 N.J. 465, 473, 109 A.2d 409 (1954), *cert. denied*, 348 U.S. 972 (1955)). "Courts will generally not inquire into a public body's motive concerning the necessity of the taking . . ." *Borough of Essex Fells* v. *Kessler Inst. for Rehab., Inc.*, 289 N.J. Super. 329, 337, 673 A.2d 856 (Law Div. 1995). Whether a taking is for a public use "is largely a legislative question beyond the reach of judicial review except in the most egregious circumstances." *See Township of West Orange* v. *769 Assocs., supra*, 172 N.J. at 576, 800 A.2d 86.

We conclude that even if the primary goal of Mount Laurel's open space acquisition program in general, and the condemnation of the Mipro site in particular, is to slow down

residential development in the municipality, this does not provide a foundation for finding that the municipality's use of eminent domain for this purpose constitutes fraud, bad faith or manifest abuse. Mount Laurel had a reasonable basis for concern that additional residential development would aggravate traffic congestion and pollution problems in the municipality and impose added stress on its school system and other municipal services. Such concerns are reflected in this State's public policy "to halt suburban sprawl." *Mount Olive Complex* v. *Township of Mount Olive*, 340 N.J. Super. 511, 541, 774 A.2d 704 (App. Div. 2001), *remanded for reconsideration*, 174 N.J. 359, 807 A.2d 192 (2002), *decision reaffirmed*, 356 N.J. Super. 500, 813 A.2d 581 (App. Div.), *certif. denied*, 176 N.J. 73, 819 A.2d 1189 (2003). The DEP recognized that Mount Laurel's acquisition of the Mipro site promotes this objective by approving a $400,000 grant for the acquisition. Moreover, although Mount Laurel's governing body has made a policy decision to focus in its open space acquisition program upon parcels that are likely to be the subject of residential development, the properties it acquires under the program nevertheless serve the public purpose of preserving open space.

Furthermore, Mount Laurel is not precluded from acquiring the Mipro site for open space simply because the developer performed site preparation work during the twenty-two-day period between the grant of final subdivision approval and the filing of the declaration of taking. We assume that once its right to acquire title is established, Mount Laurel will restore the site to its natural state.

This is not a case such as *Kessler Institute, supra,* 289 N.J. Super. 329, 673 A.2d 856, in which the court dismissed an action to condemn property on which the owner planned to construct medical rehabilitation and nursing facilities, or the unreported opinion of this court relied upon by respondents that affirmed dismissal of an action to condemn land on which the owner planned to construct a development

that would have provided multi-family housing affordable to middle-income families. In those cases, the condemnees' proposed uses of their properties implicated significant public interests, and the courts found abuses of the eminent domain power in the municipalities' attempts to prevent those uses. If Mount Laurel had attempted to condemn Mipro's property when its predecessor in title planned to construct an assisted living facility on the site, a similar finding might have been warranted. However, Mipro's plan to construct a development of single-family homes that will be affordable only to upper-income families would not serve a comparable public interest.

Finally, we note that there is no indication that the Mipro site was treated differently than other large tracts of vacant land on which residential developments were planned. Mount Laurel's acquisition of the Mipro site is simply one component of a broad-based municipal program for acquisition of additional open space, approved by Mount Laurel's residents in multiple public referenda, in which priority is given to acquisition of properties that are likely to be the subject of residential development. Thus, this is not a case in which a condemnation action ostensibly brought for a legitimate public purpose, such as acquisition of additional open space, was actually brought for a discriminatory reason or other improper motive. Therefore, this case is governed by the general rule that "[c]ourts will generally not inquire into a public body's motive concerning the necessity of the taking or the amount of property to be appropriated for public use." *See Kessler Institute, supra*, 289 N.J. Super. at 337, 673 A.2d 856. Applying this rule, there is no basis for a finding of abuse of the eminent domain power in Mount Laurel's condemnation of the Mipro site.

Accordingly, the final judgment dismissing Mount Laurel's complaint is reversed and the case is remanded to the trial court to appoint condemnation commissioners to value the property. Because the post-judgment order

awarding Mipro counsel fees, costs and other expenses was based on the dismissal of this condemnation action, *see* N.J.S.A. 20:3-26(b), which we have determined Mount Laurel is entitled to maintain, that order also is reversed.

APPENDIX C

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

MOUNT LAUREL TOWNSHIP,	:	**SUPERIOR COURT**
	:	**OF NEW JERSEY**
	:	**LAW DIVISION**
Plaintiff	:	**BURLINGTON**
	:	**COUNTY**
vs.	:	**DOCKET NO. 1-1745-02**
MIPRO HOMES, L.L.C., LORRAINE C. ELBON, and 190 Elbo, L.L.C.,	:	**Civil Action**
Defendants	:	**OPINION**
BUILDERS LEAGUE OF SOUTH JERSEY, INC.,	:	
Intervenor	:	

On May 24, 2002, the Township of Mount Laurel ("Township" or "Mount Laurel") filed a Verified Complaint and Order to Show Cause seeking to condemn property owned by Mipro Homes, L.L.C. ("Mipro") known as Block 600, Lots 2.0, 2.03 and 2.05 on the Official Tax Map of Mount Laurel Township, also known as High Pointe Estates. Mipro answered on June 14, 2002 and filed a motion returnable June 21, 2002, also the return date of Mount Laurel's Order to Show Cause, seeking an order denying the relief sought by Mount Laurel, namely, the right to condemn and the appointment of commissioners. Mipro also requested discovery. Mipro's relief was granted by Order dated September 10, 2002.

Builders League of South Jersey ("BLSJ") moved to intervene. That application was granted on August 2, 2002. Subsequently, on August 29, 2002, a discovery order was entered allowing Mipro's counsel to depose certain Mount Laurel officials and to serve a Demand for Production of

Documents. Thereafter, cross-motions for summary judgment were filed and the matter was orally argued before the court on May 27, 2003.

The property in question consists of 16.43 acres and is zoned for residential use. On July 30, 2001, Mipro executed an agreement to purchase the property from 190 Elbo, L.L.C. Mipro's application for Conditional Preliminary Major Subdivision Approval was granted by the Mount Laurel Township Planning Board on May 10, 2001 and the Resolution memorializing that approval was adopted on June 14, 2001. The approved plan called for 23 single family building lots on which Mipro intended to build houses in the $400,000.00 to $450,000.00 range. The purchase by Mipro was consummated on August 30, 2001. In February, 2002, after the conditions of the initial approval were satisfied, Mipro applied to the Planning Board for Final Major Subdivision Approval. Following a hearing before the Board on May 9, 2002, the application was granted. Site work, consisting of clearing, grading, excavation for sewer and stormwater lines, a retention basin and the stockpiling of dirt, began immediately thereafter.

In early December, 2001, several months after the initial approvals were obtained, Mount Laurel adopted a resolution authorizing an application for Open Space Preservation Funding to the Burlington County Board of Chosen Freeholders. Appraisals were prepared by J. McHale & Associates dated February 11, 2002, and Renwick and Associates dated February 27, 2002, each using an evaluation date of January 21, 2002. On April 1, 2002, Ordinance 2002-4 was introduced. It authorized the acquisition of Mipro's property based upon a completed "qualification for the Green Acres Incentive Grant Program within the New Jersey Preservation Trust" and contained a determination by the Township Council that the property "is under severe development pressure" and "has been made the subject of a major residential subdivision application." The Ordinance

also recites that the property is "within Mount Laurel Township's open space inventory."

Unilateral discovery was taken by Mipro which included the production of documents from the Township as well as depositions of George Morris, Deputy Manager of the Township, John Maczuga, formerly employed by Bay Pointe Engineering as director of planning, Louis Glass, township planner for 17 years, and Harry McVey, a partner in Louis Glass Associates.

Mount Laurel maintains that two distinct legislative enactments justify its condemnation of Mipro's property even though the only "public purpose" of the acquisition is to "conserve" the property in its natural state and there is no present or reasonably foreseeable "need" for the property for any specific public purpose. Those enactments are N.J.S.A. 40:12-15.1, et seq. approved February 28, 1997, and N.J.S.A. 13:8C-1, et seq. effective June 20, 1999. The first of those laws provides that a governing body of a municipality may submit to the voters a proposition authorizing the imposition of an annual levy for the purpose of acquiring, developing and maintaining lands for recreation and conservation purposes, acquiring farm land for preservation, the historic preservation of historic properties and the payment of debt service related thereto. The second enactment which establishes the Garden State Preservation Trust, contains legislative findings that enhancing the quality of life of the citizens of New Jersey is a "paramount policy" and that acquisition and preservation of open space, farm land and historic properties enhances the character and beauty of the State, providing "its citizens with greater opportunities for recreation, relaxation and education; that the lands and resources now dedicated to these purposes will not be adequate to meet the needs of an expanding population in years to come; . . . and that *it is necessary and desirable to provide funding* for the development of parks and other open space for recreation and conservation purposes." (Emphasis

added.) Mount Laurel points to that portion of the Act which states that

> "The Legislature therefore determines that it is in the public interest to preserve as much open space . . ., as possible within the means provided by the 1998 constitutional amendment; . . ."

Mount Laurel argues that N.J.S.A. 13:8C-1, et seq. generally provides for and "specifically articulates" the definition of "development easement" in terms of the interest of the public in "stopping development." The Township contends that "stopping development" is not only permissible but is, in itself, a laudatory goal which does not run afoul of either the Municipal Land Use Law (MLUL) or the Eminent Domain Act of 1971, N.J.S.A. 20:3-1, et seq. Essentially, it is Mount Laurel's position that the law authorizing referenda and the Preservation Trust Fund are instruments which allow the Township to take properties under development if the sole goal is to preserve the land in perpetuity and the stopping of development is a legitimate collateral consequence of such taking. In furtherance of its goal to acquire as much land, under severe development pressure, as possible, Mount Laurel placed three referenda on the ballot in the years following enactment of the enabling legislation. Each passed overwhelmingly by the voters resulting in the imposition of a tax levy dedicated specifically to the acquisition of open space properties by purchase rather than condemnation. As a result, it is undisputed that Mount Laurel has negotiated the purchase of numerous properties which were developable. Indeed, the deposition testimony of George Morris supports that conclusion: "We were trying to buy as much as we could for the dollars that the Township residents had provided, that the County would help fund, and the State would help fund . . . And then we would have the ability in the future to evaluate if we needed active or passive recreation . . . We understood that if we purchased one property a year over 20 years there wouldn't be anything to

buy in those last 10 years because land is so scarce here in Mount Laurel."

Mipro has maintained from the outset that the sole purpose of the taking is to halt the specific development of 23 houses on the property in question, a motive not condoned by the law of condemnation or the Municipal Land Use Law and not supported by the enactments alluded to by Mount Laurel. Mipro argues that those enactments are merely funding mechanisms for the purchase of open space from willing sellers and not the taking of private property from persons unwilling to sell their properties. In support of its opposition to the condemnation, Mipro presents what it considers to be powerful and overwhelming evidence that the Township has embarked upon a crusade to stop development under the guise of conservation, a motive that is absolutely prohibited by our case law.

The evidence presented to this court by Mipro is undisputed. It consists primarily of deposition testimony and documents produced by the Township in answer to discovery requests or previously produced by way of a rather substantial appendix to the Township's initial brief in support of its Order to Show Cause. Examples of Mipro's evidence concerning improper motive by the municipality include: (1) Signs throughout the Municipality on property purchased for open space read: "More Acres Saved From Development—Your Open Space Dollars At Work." (2) On January 7, 2002, at the reorganization meeting of the Township Council, outgoing mayor, Geraldene Nardello said that: "We have identified other residential subdivisions with preliminary approvals adjacent to the intersection of Hainesport Road and Elbo Lane. As on Hooten Road, *we have interfered with the plans of the developers who have already received preliminary approval. We will continue to do so until the taxpayers acquire the land and it remains open space forever."* (Emphasis added.) (3) Various newspaper articles quote the Township Solicitor as stating that the Township's

goal is to "protect the land from development" and to actively acquire land "slated for development." (4) George Morris, in his deposition, testified that he was primarily responsible for the day-to-day handling of open space issues from the Winter and early Spring of 1998. He said that he never consulted with the Planning Board in regard to the Master Plan and that he "assume[d] that the Township's interest was in potentially reducing the number of residential units in the Township . . ." He testified that when he prepared the list of properties for acquisition, he did not consider whether those parcels could be used for open space recreation but only that they could be used for passive purposes. He confirmed that no study was undertaken to determine how much passive open space was needed in Mount Laurel or what the active open space needs were. He was asked: "How did you evaluate when you have enough active recreation? How did you make that analysis?" He answered: "I think the governing body will make that analysis when the voters tell them enough is enough." Regarding a plan for the acquisition of property, Morris testified that he "didn't produce the master plan . . . No, I did not consult the master plan." The Township planner, "Mr. Glass[,][was not involved] in the process because he was not supposed to be part of the process." Insofar as a benefit to the Township was concerned, Morris stated: "The acquisition of properties that's residentially zoned served the purpose of increasing our open space and it had the benefit of removing the potential that homes could be developed there." He confirmed that no properties other than High Pointe Estates "have become the subject of eminent domain complaints." As to the amount of property to be acquired under his plan, Morris stated: "We haven't set a maximum goal." When asked if there was a minimum goal, he answered: "No." Regarding the letter sent to all residents by Mayor Nardello, Morris was asked: "Is the implication as I suggested that there would be a savings to the residents of Mount Laurel if residential property was acquired as open space and not

developed? Is that a fair reading in your opinion of that?" He answered: "A fair reading is if homes are developed there would be a significant cost." (5) John Maczuga testified that his company, Bay Point Engineering, was hired to do an "open space and recreation plan geared . . . to . . . the State's Planning Incentive Grant Program . . ." He also testified that there was no rating or ranking system by which properties were prioritized for acquisition, that he relied exclusively upon the Township for that information without knowing specifically who or which subordinate boards were formulating those decisions. His instructions were "to be very aggressive in terms of open space acquisition . . ." "They were concerned that they had placed open space acquisition on the back burner for a long time, and they had a lot of catching up to do." Fairly early on in the process, he had obtained information as to which properties had development approvals. He explained why the Township was not interested in the Mipro parcel previously: "It's my understanding now that it was going to be an assisted living facility. It was long in the process, and had some Mount Laurel [Mount Laurel II] significance, affordable housing significance to the Township." Concerning "need," he was asked: "Okay. Do you have an opinion, if any, whether additional open space is needed in Mount Laurel Township; needed?" To which he answered "Needed? . . . I can't—I have not empirically analyzed that situation, other than what we did in the open space and recreation plan itself and there was a need." (6) Louis Glass, who serves as a Township planner for both the planning board and zoning board of adjustment for nearly 27 years, testified that he prepared most of the 2000 Master Plan except for the portion on Recreation and Open Space which was copied from work done by Bay Point Engineering. That portion of the Master Plan was not amended by the Planning Board until January 9, 2003 and it contained no projected "need" for open space, reciting only that the Township had 814 acres of open space dedicated to public use. Mr. Glass acknowledged that the

Master Plan contains a statement on Page L-2 as follows: "Therefore, the Township is in an excellent position to provide park and recreation land under this standard" (referring to the Population Methodology of Computing Open Space Need). Quoting further, Mr. Glass said: "By combining the public and school lands, the Township now has 721 acres available which is well in excess of the amount of land needed according to the standard." When questioned concerning the application of the Percentage of Area Method of determining the need for open public space, Glass stated: "That paragraph on the Percentage of Area Method says using that method Mount Laurel would need 425 acres of local parks and then it concludes with the sentence 'at the current time, the township has a two hundred and ninety-six acre surplus using this method.'" Regarding the dedicated funding source available to Mt. Laurel as a result of the referenda passed by the electorate, the following colloquy occurred:

> "A. Since the township now has a dedicated funding source, all parcels are subject to potential open space acquisition.
>
> Q. Mr. Glass, am I correct or would I be correct in reading that any undeveloped parcel now under the master plan amendment could be acquired for open space?
>
> A. Correct.
>
> * * *
>
> Q. One more question, Mr. Glass. Do you have any knowledge whatsoever as to what use the township proposes to put the parcels that it has acquired since the 2000 Master Plan, what use specifically they will put the parcels to?
>
> A. No."

This matter lends itself to disposition by summary judgment. In fact the parties agree that there exists no material factual dispute. Rather it is the interpretation of those facts as they have been applied in a widely disparate way to controlling case law that is disputed. Nonetheless, I am satisfied that no fair minded fact finder could reach but a single conclusion. *Brill* v. *Guardian Life Insurance Company of America*, 142 N.J. 520 (1995).

My analysis must begin with a review of the governing principles of law. According to both the United States Constitution and the Constitution of New Jersey, a governmental entity is permitted to take private property for public use in exchange for just compensation. U.S. Const., amend V, amend XIV; N.J. Const., Art. I, Par. 20, *State* v. *Silver*, 92 N.J. 507, 513 (1983). Since condemnation is exclusively a legislative function, broad discretion is granted to condemning authorities to determine what property and the amount of property are to be taken. *State* v. *Lanza*, 27 N.J. 516, 530 (1958); *Twp. of West Orange* v. *769 Acres*, 172 N.J. 564, 571 (2002); *Texas Eastern Transmission Corp.* v. *Wildlife Preserves, Inc.*, 48 N.J. 261, 269 (1966); *Borough of Essex Fells* v. *Kessler Inst.*, 289 N.J. Super. 329, 387 (Law Div. 1995). As a general rule courts will not inquire into a condemnor's motive or the necessity for the taking. *Ibid.* Consequently, when a governing body adopts an ordinance in the exercise of its power of eminent domain, that determination is presumed valid. *Taxpayers Assoc.* v. *Weymouth Township*, 71 N.J. 249, 264 (1976). Courts will only consider evidence concerning the legislative purpose, in the context of a facially valid ordinance, "when the reasonableness of the enactment is not apparent on its face." *Riggs* v. *Twp. of Long Beach*, 109 N.J. 601, 613 (1988). The party asserting fraud, bad faith, abuse of discretion or arbitrary or capricious action has the heavy burden of proof, *State* v. *Malibu Beach, Inc.*, 209 N.J. Super. 291, 296 (Law Div. 1986), by clear and convincing evidence. *Essex City Improvement Authority* v. *RAR Dev. Assoc's*, 323 N.J. Super.

505, 516 (Law Div. 1999). Courts will not enforce a decision to condemn if the condemning authority has acted with "improper motives, bad faith or some other consideration amounting to a manifest abuse of the power of eminent domain." *Borough of Essex Fells, supra* (quoting *Tennessee Gas Transmission Co.* v. *Hirshfield*, 39 N.J. Super. 286, 288 (App. Div. 1956). Thus, a condemnation may be set aside when a public body condemns for an authorized purpose, but is motivated by an ulterior, disguised purpose which is not authorized by law. *Essex Fells, supra*, at 338.

Bad faith "generally implies the doing of an act for a dishonest purpose," and also contemplates ill will. *Id.* at 338. Bad faith exists when there is a valid purpose for taking property, but the condemning authority is motivated by reasons beyond the power conferred by law, i.e., a pretext.

With these general principles in mind, I must now engage in a detailed analysis of the cases relied upon by the parties in this litigation. I begin first with *Borough of Essex Fells* v. *Kessler Institute*, 289 N.J. Super. 329 (1995). Essex Fells is a small borough and 20% of its land is devoted to municipal, park and other open space. Kessler is a non-profit rehabilitation facility which provides treatment and services to people with physical disabilities in 3 north Jersey towns. It looked to Essex Fells to establish a skilled nursing facility and transitional living facility consisting of 20 units. The parcel selected by Kessler is 12.5 acres adjacent to a 68 acre parcel of municipally owned land, mostly wooded and containing the borough's wells and water recharge area. There are several buildings on the tract which is zoned for educational use. The borough purchased approximately 2.5 acres for a soccer field and its officials actively sought residential developers to buy the balance of the property and to construct single family houses. A year before the borough bought the acreage for a soccer field, its planner wrote a report suggesting that the educational zoning be amended to residential, but there was no recommendation that the

borough acquire it for any purpose. When Kessler expressed an interest in the property, the mayor said to Kessler representatives that the town "had never wanted anything but single family housing" there. Kessler, nevertheless, signed a purchase agreement for the parcel and applied to the planning board for conditional use amendment of the zoning ordinance. Public sentiment expressed at the planning board meetings was clearly against Kessler's proposal. The borough's retained expert planner and land use attorney found Kessler's proposal appropriate prompting the mayor and council to authorize the preparation of a zoning ordinance amendment to allow Kessler's development. Local citizens formed the Essex Fells Preservation Committee which conducted several rallies in opposition to the plan and distributed a flyer opposing the mayor and council as well as making highly discriminatory comments about persons with disabilities. As a result of this pressure, local officials decided to send a questionnaire to each residence rather than amending the ordinance. It asked whether they would pay additional taxes to purchase the property for park land. The results were 3 to 1 in favor of acquisition. A resolution authorizing the purchase was passed and an offer to purchase was extended to Kessler. The offer was rejected and Kessler immediately applied for a zoning variance. The borough adopted an ordinance authorizing condemnation of the property and the court thereafter stayed proceedings on the condemnation complaint pending resolution of Kessler's bad faith claim. The zoning board of adjustment thereafter denied Kessler's application for a zoning variance.

The trial court, recognizing the general principle that courts will not ordinarily inquire into a public body's motive concerning the necessity of a taking or the amount of property to be acquired for public use, *Riggs* v. *Long Beach Twp.*, 109 N.J. 601, 613 (1988), determined that a decision to condemn shall not be enforced where there has been a showing of "improper motives, bad faith, or some other consideration amounting to a manifest abuse of the power of

eminent domain." *Tennessee Gas Transmission Co.* v. *Hirschfield, supra.* The court determined that "public bodies may condemn for an authorized purpose but may not condemn to disguise an ulterior motive." Citing numerous cases from other states, there having been in New Jersey at the time for that proposition, Judge Fuentes said:

> "These cases made it clear that where a condemnation is commenced for an apparently valid, stated purpose but *the real purpose is to prevent a proposed development which is considered undesirable, the condemnation may be set aside.*" (Emphasis added.)

Applying those principles of law to his understanding of the record before him, Judge Fuentes concluded that the proposed taking of Kessler's land for a public park:

> ". . . was . . . not based on a public need but in response to community opposition to Kessler's proposed use of the property."

Engaging in the fact sensitive analysis required in such situations, the Judge alluded to statements of public officials such as, "I would not prefer to have Kessler Essex Fells, okay?" and "You've got to condemn and you've got to develop a public need . . . we've got to come up with a need that the court will allow." He also concluded that his review of the record failed to disclose "any public discussion, debate or demand for any additional park land or open space until public opposition to Kessler's development plans intensify." The judge dismissed the complaint, being "clearly convinced from the . . . record . . . that the borough proceeded to condemn . . . Kessler's development . . ."

Plaintiff and defendant each cite the unpublished opinion in *Township of North Brunswick* v. *U.S. Homes Corporation*, A-2929-1T2 (App. Div. 2003) in support of their opposite positions. There the property in question was 105 acres of farm land zoned I-2 industrial and Plaintiff was the contract purchaser. In 1989, the governing body approved the open

space and recreation element of its 1984 master plan which included a recommendation that the municipality acquire an additional 109 acres for active recreation space to include baseball, softball, football and soccer fields as well as basketball, tennis and volleyball courts. The plan was based upon a standard adopted by the Department of Community Affairs and the National Recreation and Park Association of 8 acres per 1000 persons for developed recreational areas. The 1989 plan specifically identified the property in question as an alternate site in the event that other sites deemed more suitable were unavailable. The 1994 reexamination report recommended rezoning the property in question to agricultural-low density residential to allow for single family houses on 6 acre lots. No rezoning occurred because farming operations continued. In 1994, the governing body was opposed to any development of the site. That sentiment was expressed in a formally adopted resolution. Defendant acquired an interest in the property in 1997 and presented a concept plan in 1999 for senior citizens housing to the planning board. The board acquiesced and submitted a draft ordinance to the governing body to rezone the property as a Planned Retirement Community. Four months before, the township adopted a resolution to ask the voters to approve a 3 cent per $100 assessed value tax to fund an open space preservation program. At the November 1999 election, the referendum was approved after which the township adopted an ordinance that created an Open Space Committee, the purpose of which was to "recommend open space acquisitions and programs." In September 2000, U.S. Homes applied for a use variance. In October 2000, the township's expert environmental consulting engineering firm submitted its plan for recreation and open space which showed a need for additional recreational facilities "as soon as possible." At that time, the township only had about 40% of its recommended active recreation area. This was based upon a need for 125 more acres to meet year 2000 needs and more land for projected needs for 2015. Further, there was an

"extreme overuse" of existing facilities and the report made acquisition of the site the "township's number one priority."

Public hearings were conducted and the plan was referred to the planning board for inclusion in a revised recreation and conservation element of the master plan. The planning board held a hearing at which U.S. Homes admitted that more recreational space was needed. The master plan was thereafter amended and the concept plan was developed to include 6 little league softball fields, 4 baseball fields and 5 soccer fields. A $15,000,000.00 bond ordinance was adopted and $6.5 million was offered to U.S. Homes for the site.

U.S. Homes alleged "bad faith" on the part of the township, asserting that its sole aim was to stop development. The Appellate Division set forth the same basic legal principles as did Judge Fuentes in *Essex Fells*. The court said the record before it was "in strong contrast" to that in *Essex Fells* because the township was able to substantiate, by way of history, the need for more recreational and open space. It determined that there was no requirement for an evidentiary hearing because the record before it had been fully developed. The court agreed with the trial judge's conclusions that "the municipality had the discretion to decide not to convert existing passive recreation areas into athletic fields," a decision not subject to judicial interference. It would have been "impractical to convert undeveloped conservation areas into active recreational facilities because they 'are dedicated water shed areas or wetlands,' [and] almost all are wooded." The various sports programs attracted significant numbers of children: soccer—850; youth football—260; and baseball and softball—780. The court concluded that the record before it showed at most a disagreement between the municipality and a private developer regarding open space requirements "and the dynamic and often controversial subject of land use public policy"—"the type of public policy dispute our system

assigns to resolution by the politically responsive branches of governments, not to courts.

A second unpublished opinion is also relied upon by the parties to this litigation to support opposite conclusions. That case is *Twp. of Monroe* v. *Noonan*, A-1443-99T1, A-1512-99T1, A-1515-99T1 (App. Div. 2001). It is a case in which appellants challenged a Law Division determination that Monroe Township acted properly in condemning their properties for open space and park use. The Appellate Division reversed. The site consisted of 10 undeveloped acres in the R-30 Residential District. In 1997, Consolidated Affiliates, L.L.C. agreed to purchase the property subject to approval by the zoning board for a Walgreens Drug Store. However, the application was never heard because of procedural problems. Applications for a funeral home, service station and repair shop were denied, withdrawn or dismissed without prejudice. The township began to consider acquisition only because of the "diverse, and non-conforming nature of the applications" being made to the zoning board of adjustment and the fact that neighboring residents expressed a preference for a park. The township engineer prepared a concept plan for a "conservatory" with a walking park and trails. The township adopted an ordinance to condemn the tract "purportedly in furtherance of the township's master plan goal of producing adequate open space and recreational facilities for present and future use." Appellants retained an expert planner who opined that the condemnation was actually for a "private purpose . . . as a buffer which . . . is not a public purpose especially in the context of a recently adopted Master Plan and even more recently adopted Open Space Plan which target and prioritize other areas . . . ."

The Appellate Division again set forth the guiding principles which govern condemnation actions and reiterated that the burden of proof is on the party asserting bad faith to show ill will or motive by clear and convincing evidence. The court determined that the stated purpose for acquiring

the site for open space and park use was a pretext for the improper purpose of precluding commercial development on the site. This was based, in part, on the engineer's certification that residents preferred a park rather than a commercial use. Moreover, the master plan was adopted shortly before the condemnation but made no reference to the "possibility or desirability of acquiring the subject site for park use or open space." Finally, the Open Space Plan did not mention the site. The interest in acquisition was prompted solely by the proposals to develop the site commercially.

In applying the law to the facts of this case, I do so by acknowledging at the outset that the site in question is zoned for residential use and that the applications filed by Mipro for development of the tract sought no variances. Secondly, it is apparent that the condemnation was commenced for a facially valid purpose, namely, the acquisition of Mipro's tract to be held in perpetuity as a passive open space. I am satisfied, however, by quite clear and convincing evidence in the record before me that the real purpose was to prevent yet another residential development in a township already under severe development pressure. As in *Essex Fells, supra*, the credible evidence here demonstrates that the public purpose articulated for the taking of Mipro's property for passive open space was not based on a true public need but solely in response to the community's sentiment expressed at the polls, coupled with clear indications from township officials, that the property be acquired to stop residential development. The impetus for the acquisition was not a real need for more open space but was the granting of Mipro's application for major subdivision approval on May 10, 2001. The Township's resort to N.J.S.A. 13:8C-1, et seq. and N.J.S.A. 40:12-15.1, et seq. as a basis to justify the taking of Mipro's property, specifically, is totally misplaced. Those enactments, while setting forth a strong public policy encouraging municipalities to acquire and preserve land, are basically funding mechanisms by which a municipality can gain access

to matching funds or dedicated tax funds for the purpose of *purchasing* open space and recreation areas. Those laws do not in any way supercede the Municipal Land Use Law and the Eminent Domain Act of 1971. Condemnation cannot replace planning and zoning. Those concepts are governed by the MLUL. The Eminent Domain Act of 1971 requires that there be both a public need and a public purpose for the acquisition of private property.

I will first discuss the evidence which I conclude to be overwhelming on the issues of "need" for Mipro's site and "public purpose" for the acquisition. Without providing the same detail as I did earlier in this opinion, I refer once again to the deposition testimony of township officials and its retained experts. George Morris, a man of relatively little experience in the area of eminent domain, was made primarily responsible for the day-to-day management of open space issues. It is obvious from his testimony that he was on a quest, initiated by township officials, to purchase as much open space as budgeted funds from dedicated tax levies and matching funds could buy. There was no open space plan from which he worked, no coordination with the planning board or consultation of the Master Plan, and certainly no prioritization or ranking of properties desirable for and needed for recreation and open space of either an active or passive nature. In fact, Mr. Morris was working on the assumption "that the Township's interest was in potentially reducing the number of residential units [to be constructed] in the Township . . ." The list of properties he prepared had little to do with actual need, present or future, because he did not consider whether the parcels on the list could be used for recreation or passive open space. There was no study or report from which he sought or could receive guidance as to the amount of active and passive open space needed, if any. His answer to one question bears repeating: "I think the governing body would make that analysis when the voters tell them enough is enough." He never consulted the Township Planner, Louis Glass, who he described as "not in

the process." He confirmed that only High Pointe Estates had become the subject of a condemnation complaint even though other developing and developable parcels remained free of the condemnation process.

John Maczuga conceded that the Township had no interest in the Mipro site when it had been approved for an assisted living facility, clear evidence that the Township had a preference for that type of development rather than a residential one. There had been much public commentary by council members prior to the condemnation reflecting concern that residential development produced little by way of tax ratables to offset the rising cost of education and other municipal services.

Moreover, the various methods used to calculate "need" for open space, be it for active or passive use, were conclusive that Mount Laurel has more than is required for its citizens' use. The Master Plan was not amended until January 2003. As amended it referenced no projected "need" for additional open space. Louis Glass confirmed in his deposition testimony that present open space acreage well exceeded the amount necessary for Mount Laurel's population. Simply put, he said that the Township's approach to open space acquisition is to buy all the land it can with available funding. "Need" was not a part of the equation.

The public comments by the Mayor and other Council Members coupled with signs around the Township declaring that more land has been spared from development is further evidence that the primary goal of Mount Laurel is to acquire property to stop development, a collateral consequence of which is preservation of open space. However, the preservation of that open space is not even a secondary goal. The savings of tax dollars for educational purpose and other municipal services appears clearly to be the objective.

Finally, the fact that Mount Laurel's voters approved three referenda for dedicated taxes is nothing more in this

case than a form of public sentiment or outcry in support of the Township Officials' efforts to halt residential development. Such public sentiment is an appropriate consideration

> "... in formulating a Master Plan or enacting a Zoning Ordinance ... it is not a proper factor in condemnation. The only justification for condemning a person's real property is to fulfill a public purpose or need. It is the public purpose of need which impels the condemnation. The condemnation cannot be used as a pretext to discourage or prevent a particular use of property. That is the function of the Master Plan and Zoning Ordinance. In short, condemnation . . . is not a means to achieve zoning . . ." *Township of Monroe* v. *Noonan*, *supra*, at pg. 8.

It cannot be overlooked in this litigation that Mount Laurel initially gave serious consideration to rezoning portions of the township to achieve the goal of reducing the impact of residential development. For reasons which do not appear in the record, however, Mount Laurel opted to purchase properties rather than to engage in an appropriate re-examination and reformulation of its Master Plan and Zoning Ordinance. There is nothing legally wrong with the chosen approach as long as the township *purchases* the property from a willing seller. The abuse of discretion and arbitrary, capricious and unreasonable action by the Township occurred when it abused the awesome power of eminent domain for a purpose not contemplated by, and indeed proscribed by, our Eminent Domain Law. This case falls squarely within the prohibitions of *Essex Fells* and *Township of Monroe* v. *Noonan*. It is also distinguishable from *North Brunswick* v. *U.S. Homes Corp.* in which the court upheld a condemnation. In that case, there was a "plan" which showed an immediate need for significant open space. The Township had met only 40% of its open space requirements and there was an "extreme overuse" of existing

recreational facilities making acquisition the "Township's number one priority." None of that is present here. There, too, the planning board had a very active role. The "plan" was referred to that Board which then revised the recreation and conservation element of the Master Plan after conducting public hearings. None of that happened here. The hearings which were conducted were done by the Township Council, obviously the inappropriate body for such action. Indeed, the Planning Board in Mount Laurel was not even consulted. In *North Brunswick*, U.S. Homes conceded that a need for more recreational space actually existed. Here, Mipro does not and should not, because there has not been shown that a "need" does exist. The overwhelming evidence in the record is to the contrary. Mount Laurel's needs have been satisfied. In short, the condemnation here can best be described as a random taking without legal justification. If the Township desires to continue to purchase property for open space, it may do so. Those purchases may only be made from willing sellers, not by resort to condemnation of tracts under development from private owners unwilling to give up their properties and vested approvals.

For the foregoing reasons, the Complaint in Condemnation is dismissed and the Order to Show Cause is discharged. The evidence shall be retrieved by counsel for Mount Laurel pursuant to R. 1:2-3. Mr. Baron shall prepare the order.

JOHN A. SWEENEY, A.J.S.C.